

1
2
3
4
5
6
7
8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
10

11 UNITED STATES OF AMERICA,

12 Plaintiff,

Cr. S-97-0461 DFL

13 v .

14 THOMAS MARTIN SUKUP,

ORDER

15 Defendant. _____
16 _____/

17 Defendant has filed four motions with the court since
18 December 1, 2005. For the reasons stated below, these motions
19 are DENIED.

20 I.

21 Defendant was sentenced to 210 months in prison after
22 pleading guilty to a drug offense in March 1999. In April 2005,
23 defendant filed a motion captioned: "District Clerk to Promptly
24 and Properly Process Defendant's Timely Filed Pro Se Notice of
25 Appeal." Even though he filed this motion more than six years
26 after he had been sentenced, defendant argues that it is timely

1 because his attorney abandoned him at the conclusion of trial and
2 he filed his Notice of Appeal in accordance with the "Optional
3 Appeal Rights Advisement" contained in the pre-sentence report.

4 Defendant has since filed the following: (1) a "Motion
5 Requesting Court for Correction of Clerical Errors in Docket and
6 Request for Clerk to Properly Process Filed Pro Se Notices of
7 Appeal Docker Numbers, #81 and #82"; (2) a motion to have counsel
8 appointed under § 18 U.S.C. § 3006A; (3) a "Motion Requesting
9 Court for an Evidentiary Hearing"; and (4) a petition for writ of
10 habeas corpus under 28 U.S.C. § 2255.

11 II.

12 A. Notice of Appeal, Appointment of Counsel, and Evidentiary
13 Hearing

14 Defendant alleges that he filed his pro se notice of appeal
15 through two letters (Docket #81 and #82). The first is a one-
16 page handwritten letter addressed to the court that states, in
17 part, "I must ask the court to my rights to appeal this
18 presentence investigation report dated 4-22-99. . . . I received
19 a copy of the report on 4-29-99 in court and [defendant's
20 counsel] has not been available to thoroughly go over the report.
21 On 4-30-99 I called and left a message requesting that we appeal
22 this report, with 5-3-99 being the last day to appeal"
23 Defendant also requested an extension of time "to appeal this
24 presentence investigation report." The letter is dated April 30,
25 1999 and was filed on May 6, 1999.

26 The second letter is three pages long and is also addressed

1 to the court. It states, in pertinent part, "I request my plea
2 of guilty withdrawn. I request my plea agreement withdrawn. I
3 request my rights to appeal my presentence report." This letter
4 is dated May 4, 1999 and was filed on May 7, 1999. Defendant
5 pled guilty in March 1999, received his sentence on June 3, 1999,
6 and judgment was entered on June 10, 1999.

7 Fed. R. App. P. 3(c) provides that a notice of appeal must
8 contain the following information: (1) the party taking the
9 appeal; (2) the judgment being appealed; and (3) the court to
10 which the appeal is taken. The purpose of the notice is to
11 inform the other party that an appeal has been taken regarding a
12 specific decision in a case. See Martin v. Clarke, 105 F.2d 685,
13 686 (7th Cir. 1939). The notice of appeal must be liberally
14 construed. Matter of TransAmerican Natural Gas Corp., 978 F.2d
15 1409, 1414 (5th Cir. 1992). An appeal will not be barred if the
16 party's intent to appeal can be fairly inferred from the notice
17 it gave and the appellee is not prejudiced by the mistake or
18 deficiency in the notice of appeal. Id. However, a court "may
19 not waive the jurisdictional requirements of Rules 3 and 4" and a
20 filing does not constitute a notice of appeal unless it is the
21 "functional equivalent" of that document. Torres v. Oakland
22 Scavenger Co., 487 U.S. 312, 317 (1988).

23 Even a liberal construction of the two letters reveals that
24 they are not the functional equivalent of a notice of appeal of
25 the judgment and sentence because they utterly fail to convey
26 defendant's intent to appeal his sentence. Instead, the letters

1 challenge the propriety of the pre-sentence report. As a result,
2 they were properly treated as objections to the pre-sentence
3 report, which is exactly how the clerk described the letters in
4 the "Docket Text."

5 The court finds that defendant failed to file a notice of
6 appeal within 10 days of the court entering judgment and that the
7 clerk did not make any clerical errors in docketing the two
8 letters. Therefore, this motion is DENIED.

9 Because there is no appeal to prosecute, the court finds
10 that defendant is not entitled to have counsel appointed for him
11 or to an evidentiary hearing. Therefore, those motions are
12 DENIED.

13 B. Petition for Writ of Habeas Corpus

14 Defendant filed his first habeas petition on June 5, 2000.
15 The court denied that petition on November 24, 2003. That
16 decision was affirmed on August 24, 2005. Defendant filed this
17 petition seeking a reinstatement of his right to directly appeal
18 his conviction on Jan 11, 2006.

19 Defendant claims that his motion should not be considered a
20 successive § 2255 because a defendant who seeks a reinstatement
21 of his right to directly appeal his conviction in his first §
22 2255 petition is permitted to file a second § 2255 petition
23 without that motion being treated as successive. Johnson v.
24 United States, 362 F.3d 636, 638 (9th Cir. 2003). Although this
25 is a correct statement of the law, it does not apply to
26 defendant. Defendant seeks to have his second § 2255

1 characterized as if it were his first, because it seeks a
2 reinstatement of his right to directly appeal his conviction, not
3 the other way around as discussed in Johnson.

4 The purpose of the Johnson rule is to ensure that all
5 prisoners are afforded at least one chance to collaterally attack
6 their sentence. However, defendant has already had and taken an
7 opportunity to collaterally attack his conviction. Moreover, in
8 his first habeas petition, defendant asserted an ineffective
9 assistance of counsel claim based on the fact that his counsel
10 failed to file a direct appeal. Therefore, the same issue
11 defendant seeks to establish on this successive filing has
12 already been fairly presented and adjudicated. Because the issue
13 was already resolved against him and because the petition is
14 successive, defendant's § 2255 motion is DENIED.

15 III.

16 For the foregoing reasons, the four motions discussed above
17 are DENIED.

18 IT IS SO ORDERED.

19 Dated: 3/9/2006

20
21 
22 _____
23 DAVID F. LEVI
24 United States District Judge
25
26